FILED
JAN 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-668

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
Petitioner,

VS.

DAVID DELMAN,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITIONER FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETER BROWN DOLAN
Counsel of Record
OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
WILLIAM K. SWANK
550 South Flower Street
Sixth Floor
Los Angeles, California 90071
(213) 683-1100
Attorneys for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) BOWNE CO

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This reply brief addresses only the contention made in Respondent's brief in opposition that the legal issue presented — whether Respondent's claims made under the Securities Exchange Act of 1934 are subject to arbitration — is not ripe for decision because Respondent may, at some future point, file a motion for reconsideration in the District Court which, if granted, would moot this appeal. Respondent's argument confuses the concepts of mootness and ripeness. The law has long recognized that the possibility that a case may become moot in the future does not make it non-justiciable. For example, in *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 692 n.32, 61 L.Ed.2d 823, 850 n.32, 99 S.Ct. 3055 (1979) the Court decided the issue of a federal district court's power to enforce certain fishing regulations through its contempt power, even

though that issue might become moot in the future because of the state's willingness to enforce the regulations:

> "The issue is still alive since state implementation efforts are now at a standstill and the [federal court] orders are still in effect."

See also U.S. v. Sharpe, 470 U.S. 675, ____ n.2, 84 L.Ed.2d 605, 612 n.2, 105 S.Ct. 1568 (1985) (Fact that the government's appeal from a decision reversing criminal convictions might become moot if the fugitive defendants were not recaptured did not foreclose decision.) Here, until Respondent successfully moves to amend the court order finding that he has signed a binding arbitration agreement, that order is still in effect and is the basis for a decision by this Court on the issue of the arbitrability of claims under the Securities Exchange Act of 1934. *See Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27 n.15, 64 L.Ed.2d 702, 722 n.15, 100 S.Ct. 2009 (1980). (Appeal from a judgment invalidating statutes which might expire in 21 days was not moot because the statutes "remain in effect so the case has not become moot, whatever the ultimate disposition of the pending bills.")

The issue presented here, although it may be mooted in the future, is now ripe for decision. "Ripeness" is a "problem . . . best seen in a two-fold aspect, requiring [the court] to evaluate both the fitness of the issues for a judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149, 18 L.Ed.2d 681, 691, 87 S.Ct. 1507 (1967).

The first part of this test focuses on whether additional factual evidence is necessary to aid the court in deciding the issue presented, or whether the issue presented is solely a legal one. *Id.* Where the issue presented is solely a legal one, as it is here, a dispute is ripe for decision even

though future events affecting the dispute may occur. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 57 L.Ed.2d 595, 98 S.Ct. 2620 (1978) (Dispute ripe because "[A]lthough it is true that no nuclear accident has yet occurred, and that such an occurrence would eliminate much of the existing scientific uncertainties surrounding the subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented, nor aid us in their resolution."); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Committee*, 461 U.S. 190, 201, 75 L.Ed.2d 752, 763, 103 S.Ct. 1713 (1983) (Dispute ripe because "[T]he question of preemption 'is predominantly legal . . .' "); *Pile Drivers Local 2375 v. Smith*, 695 F.2d 390, 392 (9th Cir. 1982) (Dispute ripe because "[P]ractically all of the issues in this case are purely legal ones. We, therefore, do not believe that waiting . . . to engage in additional activities in the performance of its contract would 'significantly advance our ability to deal with the legal issues presented, nor aid us in their resolution.' "). Here, the single issue presented by this Petition for Certiorari is an abstract legal one: Whether claims made under the Securities Exchange Act of 1934 are arbitrable. No additional factual development can occur which will aid the court in determining this purely legal issue.

The second part of the "ripeness" test focuses on the hardship and relative certainty of injury to the Petitioner caused by the status quo. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 18 L.Ed.2d 681, 691, 87 S.Ct. 1507 (1967). Here, the injury to Petitioner caused by the Ninth Circuit's decision is immediate and apparent as it is presently being denied any right to compel arbitration of Respondent's claim under the Securities Exchange Act of 1934. This inability causes the expenditure of money in

discovery and trial preparation which would be avoided if Respondent were compelled to arbitrate. Further, denial of this Petition will effectively deprive Petitioner of any review of the Ninth Circuit's ruling until *after* the trial in this matter since the district court has not stayed the proceedings before it. Thus the harm suffered by Petitioner is not only presently occurring, but will certainly continue to occur until the issue presented by this petition is decided.

Even if Respondent were to file his motion for reconsideration, decision on the issue presented by the petition herein would not be avoided unless he were successful. Respondent's position that he can delay decision of an important legal issue and reap the benefits of the Ninth Circuit's decision until the happening of a contingency that he controls is analogous to an administrative agency claiming that persons injured by administrative rulemaking cannot seek redress until the agency actually prosecutes them. This Court has long held that the *in terrorum* effect of the status quo makes such controversies ripe where one of the parties suffers a present injury. *Babbitt v. United Farm Workers National Union,* 442 U.S. 284, 301-03, 60 L.Ed.2d 895, 908-10, 99 S.Ct. 2301 (1979); *see also, McKenna v. Peekskill Housing Authority,* 83 F.R.D. 600, 603-04 (S.D.N.Y. 1979) (Plaintiff's action challenging visitation policy of housing authority not moot despite the impending "federalization" of the housing authority since plaintiff's "lawsuit should not be controlled by the federal government's proposed construction schedules.")

The fact that some future judicial action may moot this controversy does not provide any ground for concluding that it is not presently justiciable. The appropriate way to respond to Respondent's claim is to grant the Petition for Certiorari and, should Respondent file and succeed in a

motion for reconsideration which moots the legal issue before the Court, then the parties can inform the Court of the occurrence of the contingency. The contingency identified by Respondent does not differentiate this case from any other case before this Court since future events can render any case moot. *See Eisler v. United States,* 338 U.S. 189, 194, 93 L.Ed. 1897, 1901, 69 S.Ct. 1453 (1949) (Murphy, J. dissenting) ("That the case may become moot . . . does not distinguish it from any other case we decide. For subsequent events may render any decision nugatory.") Until such time as this case is actually mooted, however, it remains ripe for decision because the issue presented is purely legal and Petitioner is currently suffering an injury.

Respectfully submitted,

PETER BROWN DOLAN
Counsel of Record
OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN, P.C.
WILLIAM K. SWANK
Attorneys for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 27, 1987, I served the within Reply Brief in Support of Petitioner for Certiorari in re: "Merrill Lynch, Pierce, Fenner & Smith Inc. vs. David Delman" in the United States Supreme Court, October Term 1986, No. 86-668;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

David T. Stowell, Esq.
Kinsella, Boesch, Fujikawa & Towle
1875 Century Park East
Suite 1600
Los Angeles, CA 90067-2593

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 27, 1987, at Los Angeles, California

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